No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARTIN A. HIRSCH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered July 19, 1943, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals has not yet been reported but it is printed at the end of the record submitted herewith. The numbers of the pages are not yet available.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28, U. S. C.).

Questions Presented

1. Is the requirement of Title 18, Section 231 of the United States Code, that false testimony be on a "material matter," satisfied when false testimony before a Grand Jury is material to an issue created solely by sheer assumption of a fact, not only unsupported by any evidence, but contrary to the only evidence in the record; or must it be material to an issue created by evidence?

2. When the determination of what is "material matter" (18 U. S. C., Sec. 231) in a Grand Jury investigation depends upon the existence of a fact, may that fact be assumed so as to cast the burden of disproving it upon the defendant; or according to fundamental rules of criminal law is the burden of proof beyond a reasonable doubt always on the prosecution?

3. When the determination of "material matter" depends on questions of fact on which there is conflicting evidence, may the Trial Judge determine those questions of fact adversely to the defendant in a criminal case and, on such determination, charge as matter of law that defendant's false testimony was on "material matter"; or, according to well-settled rules of criminal procedure, must the questions of fact be submitted to the trial jury for its determination?

4. In a Grand Jury inquiry, what is the test of whether testimony is on "material matter" as required by Title 18, Section 231, United States Code?

5. Did the Trial Court err in charging the trial jury as matter of law that petitioner's false testimony was on a "material matter"?

Statute Involved

Title 18, Section 231, United States Code, provides:

> "SECTION 231. (Criminal Code, section 125.) PERJURY. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Statement

The indictment, consisting of one count, alleges that petitioner committed perjury before the May, 1941, Grand Jury of the Southern District of New York by falsely testifying before that body that he had loaned $5,000 to one Leo Levy. The indictment alleges that such false testimony was material to an investigation then being conducted by the Grand Jury into a violation of Section 420a, Title 18 of the United States Code, commonly called the Anti-Racketeering Act (fols. 10-15). That investigation was concerned with alleged acts of extortion committed in interstate commerce by persons connected with the IATSE (International Alliance of Theatrical Stage Employees and Moving Picture Operators) (fols. 12, 31, 52-53).

The alleged perjurious testimony of petitioner was given by him on June 12, 1942. Prior to his testifying, three

persons indicted by the Grand Jury for violations of the Anti-Racketeering Act had been convicted and sentenced (fols. 33, 40, 90, 94-96, 162, 244-273). One of these defendants was Nicholas Circella, alias Nick Dean.

Circella was indicted on September 29, 1941 (fol. 55). He pleaded not guilty on December 2, 1941, and bail was fixed at $25,000 (fols. 33, 36). On December 4, 1941, petitioner posted as bail for Circella $25,000 in cash (fols. 36-37, 153-154, 202-210). Admittedly, the posting of this bail is the only connection petitioner had with the persons being investigated by the Grand Jury in its investigation under the Anti-Racketeering Act. There is no evidence of any nature of any other connection of petitioner with the alleged extortioners, with the IATSE, or with any person affiliated with it.

Circella pleaded guilty on March 18, 1942, and on April 7, 1942, he was sentenced to eight years' confinement and was fined $10,000 (fols. 21, 33, 40, 152).

After the sentence of Circella, petitioner attempted to obtain a refund of the $25,000 he had posted as bail for Circella. He was told that the government insisted upon retaining it in payment of the $10,000 Circella fine. After consultation with an attorney, petitioner, in order to obtain the release of the remaining $15,000, consented to the retention by the government of $10,000 in payment of the fine imposed on Circella. He then accepted a return of $15,000 (fols. 21, 41, 162, 214-221). Petitioner's consent to the retention by the government of $10,000 was justified at the time by such cases as *Bankers Mortgage Co.* v. *McComb* (C. C. A. 10, 1932), 60 F. (2d) 218; *United States* v. *Werner* (D. C. N. D. Okla. 1931), 47 F. (2d) 351; *Gilbert* v. *Laidlaw* (1886), 102 N. Y. 588. Since then, the Circuit Court of Appeals for the Second Circuit has refused to follow those cases. *United States* v. *Davis,* decided April 30, 1943, not yet reported, affirming 47 Fed. Supp. 176.

On June 12, 1942, petitioner was subpoenaed as a witness before the Grand Jury. His interrogation before the Grand Jury was purportedly to determine whether the

$25,000 he had posted as bail for Circella was part of the proceeds of the IATSE extortions (fols. 34-35, 43, 46).

Petitioner explained before the Grand Jury that he had posted bail for Circella at the request of Mrs. Circella and one Rogers who had agreed to make good any loss and who had held out the prospect of future business to petitioner who is an accountant and tax consultant (fols. 138, 143, 153-154). Petitioner then fully described how the $25,000 bail had been taken from his own personal funds kept in a safe deposit vault (fols. 155-160).

After petitioner had fully testified as to the source of the $25,000, his interrogation before the Grand Jury was continued, although the purported reason for his being called as a witness was the desire of the Grand Jury to determine the source of the $25,000 (fols. 34-35, 43, 46). In the course of this further interrogation, petitioner falsely testified that he had, subsequent to May 1, 1942, loaned $5,000 to one Leo Levy (fols. 165-171). His testimony before the Grand Jury as to the source of the $5,000 purportedly loaned to Leo Levy is vague and conflicting. Whether it came from the $15,000 of the Circella bail that had been returned to petitioner or from his own separate personal funds is not clearly established. The entire testimony of petitioner before the Grand Jury on this subject is as follows:

> "Q. What happened to the $15,000 in cash? What did you do with that? A. I have got most of it, and some of it I have got loaned out * * *" (fol. 164).
>
> "Q. You put it (the $15,000) right back in the vault? A. That's right, that's right. And then I took some of it out" (fol. 165).
>
> "Q. And did it (the $5,000 loan to Leo Levy) come out of the money which you got from the Circella bail? A. It came out of my box. I don't know if it was the exact money or not" (fol. 171).

In spite of the conflict in petitioner's answers, and in the absence of any finding of fact by the trial jury, the

Circuit Court assumed as a fact that the $5,000 loan to Leo Levy came out of the $15,000 returned to petitioner. In its opinion, the Circuit Court quotes "and some of it I have got loaned out" from the testimony at folio 164, completely disregarding the testimony at folio 171.

This unwarranted assumption of fact was an essential part of the theory on which the Circuit Court sustained the Trial Court which had charged, as matter of law, that petitioner's false testimony of a $5,000 loan to Leo Levy was on a "material matter" (fol. 120).

Upon the trial, Irving Hirsch, a brother of petitioner, testified that at the time of the alleged loan to Leo Levy, he borrowed $5,000 from petitioner (fols. 108-109). That testimony corroborated voluntary retractions made by petitioner in a private hearing before the prosecutor a few days after his original Grand Jury testimony (fols. 87, 226-232), and in his second appearance before the Grand Jury four months later (fols. 90, 233-243). In both of these retractions, petitioner testified that the $5,000 loan had been made to Irving Hirsch and not to Leo Levy. Irving Hirsch, although available, was never called as a witness either before the Grand Jury or for private examination by the prosecutor (fols. 110-111).

Neither Leo Levy nor Irving Hirsch was a subject of the Grand Jury investigation. Neither ever had any contact with IATSE or any person connected with IATSE (fols. 80-84, 112). Leo Levy, although twice called as a witness before the Grand Jury, was asked no questions relating to any investigation of IATSE under the Anti-Racketeering Act (fol. 83). His interrogation was solely on the subject matter of the alleged $5,000 loan made to him by petitioner (fol. 84). Irving Hirsch, as already stated, was never called as a witness before the Grand Jury (fol. 111).

The alleged perjury of which petitioner has been convicted was his false testimony of a loan of $5,000 to Leo Levy (fols. 10-15). Although originally subpoenaed before

the Grand Jury to explain the source of the $25,000 bail (fols. 34-35, 43, 46), no charge of perjury has been predicated upon petitioner's testimony that that money was his own. In addition, no evidence was presented to the Grand Jury and none was offered at the trial herein to contradict petitioner on this subject or to prove that the source of the $25,000 was anything other than petitioner's own personal funds. The only testimony in the entire record on this subject is the testimony given by petitioner before the Grand Jury that the $25,000 came from his own personal funds (fols. 155-167).

It is not claimed in this petition that there was insufficient evidence for the trial jury to find that petitioner's testimony that he loaned $5,000 to Leo Levy was wilfully false. This petition is based on the fact that the charge of the Trial Court that such testimony, as matter of law, was material to the investigation of the Grand Jury into extortions in interstate commerce, was error, and that the reasons on which the Circuit Court sustained this ruling require the exercise of the supervisory jurisdiction of this Court.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals for the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Clayton* v. *United States* (1922), 284 Fed. 537.

2. The decision of the Circuit Court raises a fundamental problem never passed on by this Court. If the materiality of the testimony of a witness before a Grand Jury depends upon the existence of a basic fact, may that fact be established by speculation and surmise unsupported by any evidence and contrary to the only evidence in the record, or does the universal rule of law apply that such basic fact, like all facts, must be sup-

ported by evidence? This problem involves a fundamental interpretation of the federal perjury statute, a fundamental determination of the powers of grand juries, and a fundamental problem of law not yet passed on by this Court.

3. The decision of the Circuit Court is contrary to the universal common-law rule that the burden of proof in a criminal case is always on the prosecution. *Lilienthal's Tobacco* v. *United States* (1877), 97 U. S. 237, 266. The Circuit Court decision casts upon petitioner, the defendant in a criminal case, the burden of disproving an assumed fact to demonstrate the immateriality of his false testimony.

4. The decision of the Circuit Court of Appeals is contrary to the rule laid down by this Court in *Insurance Co.* v. *Newton* (1874), 89 U. S. (22 Wall.) 32. The *Newton* decision holds as axiomatic the rule that conflicts between admissions and self-serving declarations are to be reconciled only by the finder of fact. In the instant case, although a conflict existed in the testimony of petitioner before the Grand Jury, that conflict was not resolved by the trial jury, although the Circuit Court assumed the truth of the testimony most adverse to petitioner.

5. The decision of the Circuit Court in upholding the Trial Court's charge that petitioner's testimony was on material matter is in conflict with the decisions of other federal courts, the decisions of various state courts and with the common law. The charge by the Trial Court was of necessity based on the Court's reconciliation of conflicting evidence. When materiality depends upon a fact on which there is conflicting evidence, it has always been held that the conflict in evidence is to be reconciled by the trial jury, and not by the Court.

ARGUMENT

1. The decision as matter of law that petitioner's testimony was on a material matter, is based on the assumption of a fact without proof, and, contrary to fundamental, well-settled law, places upon the defendant in a criminal case the burden of disproving the assumed fact.

The Grand Jury interrogation of petitioner was purportedly to determine whether the $25,000 used by petitioner to bail out Circella was his own money or whether it was the proceeds of extortion. The Grand Jury had no proof that the money came from any source other than petitioner's own funds. At no time did it obtain any such proof. The only testimony it ever had was that of petitioner that the money was his own. The inquiry at most was based solely on speculation.

The Circuit Court held petitioner's false testimony material on the ground that the alleged loan to Leo Levy related to the disposition of part of the original bail fund. Part of its reasoning is:

> "We may concede the appellant's argument that if the money really was his, whether or not he made a loan of part of it to Levy was immaterial. But the very issue was whether the money did belong to him. What he did with it was relevant to that issue."

From this, it appears that if petitioner established that "the money really was his," his false testimony was immaterial and he was not guilty of perjury. In the complete absence of proof that the bail money did not belong to petitioner, the Circuit Court has cast on him the burden of proving that it was his own. Under this theory, the interrogation of any witness before a Grand Jury is material if the Grand Jury assumes, without any evidence, a

state of facts which the witness cannot conclusively disprove. This shifting of the burden of proof to a defendant in a criminal case violates a basic rule of the common law. *Lilienthal's Tobacco* v. *United States* (1877), 97 U. S. 237, 266.

In addition, although required by the authorities cited on page 12 of this petition, there was no finding of fact as to the ownership of the bail money. The record being devoid of any evidence to the contrary, as matter of law, the only fact that could have been found was that the money was petitioner's.

The decision of the Circuit Court completely eliminates the requirement of materiality from Title 18, Section 231, U. S. C. All testimony in a Grand Jury is material if the issues are to be determined not by proof but by the unlimited imagination of the Grand Jury.

2. The decision as matter of law that petitioner's testimony was on a material matter, involved the decision by the Trial Court, contrary to fundamental, well-settled law, of disputed questions of fact which should have been submitted to the trial jury.

From the opinion of the Circuit Court, it appears that the Court held that the false testimony of petitioner was on a material matter since it pertained to "what disposition he made of $5,000 of the returned bail money" (Opinion of Circuit Court). The theory of the Court appears to be that the Grand Jury was tracing the Circella bail money and that the supposed $5,000 loan to Leo Levy allegedly came from that particular money. In reaching its conclusion, the Court in its opinion quotes from folio 164 of the record (see p. 5, this petition). No reference is made by the Court to the following specific interrogation relating to the same subject:

> "Q. And did it (the $5,000 loan to Leo Levy) come out of the money which you got from the

> Circella bail? A. It came out of my box. I don't know if it was the exact money or not" (fol. 171).

The only testimony in the record as to any connection between the alleged $5,000 loan to Leo Levy and the Circella bail money is the conflicting admissions of petitioner set forth in full on page 5 of this petition.

There is an obvious inconsistency and conflict between the admissions at folios 164 and 165 and the admission at folio 171. The answer at folio 171, if found to be the truth, does not sustain the theory of the Circuit Court, as expressed in its opinion, that "the appellant's falsehood as to what disposition he made of *$5,000 of the returned bail money* had, in our opinion, a natural tendency to impede the grand jury's inquiry * * *." That answer, standing alone, constitutes a failure of proof.

It is fundamental settled law that admissions must be taken as an entirety and the resolution of conflicts and inconsistencies is for the trier of the facts.

> *Insurance Company* v. *Newton* (1874), 89 U. S. (22 Wall.) 32;
>
> *Perrin* v. *United States* (C. C. A. 9, 1909), 169 Fed. 17;
>
> *Nelson* v. *Rural Educational Ass'n* (1939), 23 Tenn. App. 409, 134 S. W. 2d 181, 190, cert. den. Tenn. ;
>
> *State* v. *Dunkley* (1935), 85 Utah 546, 39 Pac. 2d 1097, 1109;
>
> *Concrete Steel Co.* v. *Reinforced Concrete Co.* (Mo. App., 1934), 72 S. W. 2d 118;
>
> *Jones, Commentaries on Evidence* (2d Ed.), Vol. III, Sec. 1063.

As was said in *Insurance Company* v. *Newton,* supra, at p. 35:

> "Every admission is to be taken as an entirety of the fact which makes for the one side, with the

> qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law."

A finding by the Court that the $5,000 was part of the Circella bail fund was an invasion by the Court of the province of the jury. Since materiality depended, under the theory of the Court, upon whether or not the $5,000 was part of the bail fund, that fact should have been submitted to the jury.

Whenever the evidence upon which materiality is to be decided is in conflict, the facts must be submitted to the jury. The Court should charge what findings would constitute materiality and which would not.

> *United States* v. *Shinn* (Ct. Ct. Oreg., 1882), 14 Fed. 447;
> *People* v. *Redmond* (2d Dept., 1917), 179 App. Div. 127, app. dism. 225 N. Y. 206;
> *Foster* v. *State* (1929), 179 Ark. 1084, 20 S. W. 2d 118;
> *Coleman* v. *State* (1911), 6 Okl. Cr. 252, 118 Pac. 594;
> *Wilkinson* v. *People* (1907), 226 Ill. 135, 80 N. E. 699;
> *Wharton, Criminal Law* (12th Ed.), Vol. II, Sec. 1550.

"Where the facts are disputed, the question should be left to the jury, with proper instructions from the court." *United States* v. *Shinn,* supra, at p. 452.

The Trial Court charged as matter of law that petitioner's false testimony was material. By so doing, the Court itself necessarily resolved a question of fact against petitioner. The Court's failure to submit that question to the jury was in violation of well-established rules of law.

3. There is a conflict between the Second Circuit and the Fourth Circuit that should be reconciled by this Court.

The decision of the Circuit Court for the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Clayton* v. *United States* (1922), 284 Fed. 537. In its brief submitted in the Circuit Court, respondent admitted that the *Clayton* decision, if good authority, required the reversal of the judgment of the District Court. Its argument was that the *Clayton* case should not be followed. The Circuit Court for the Second Circuit, in its opinion herein, makes no attempt to distinguish the *Clayton* decision.

In the *Clayton* case, Clayton was a witness before a Grand Jury that was inquiring into violations of the National Prohibition Act. He falsely denied that he had purchased any intoxicating liquor during the time under investigation. He also falsely denied being intoxicated durng that time. The Circuit Court of Appeals for the Fourth Circuit held that his false denial of the purchase of liquor was on a material matter since it concerned the fundamental fact being investigated. The Court held, however, that his denial of being intoxicated was not on a material matter.

It is impossible to reconcile the decision in the *Clayton* case with the decision in the instant case. Had Clayton admitted being intoxicated, he would have been compelled to testify before the Grand Jury as to the source of the liquor, the very matter under investigation. The distinction drawn in the *Clayton* case is in direct conflict with the theory of the Circuit Court decision in this case. Here, the Court relied upon broad, general language quoted from its prior opinion in *Carroll* v. *United States* (1927), 16 F. (2d) 951, cert. den. 273 U. S. 763. The theory of the *Carroll* case would require a holding that Clayton's false testimony as to his intoxication undoubtedly influenced

and impeded the investigation being conducted by that Grand Jury.

The language quoted from the *Carroll* case was unnecessary to the decision of that case. There the false testimony of the defendant related to the persons present at the very time of the commission of the crime being investigated. Such testimony would have been material even upon a trial before a petit jury. The broad statement in the *Carroll* case as to the test of materiality before grand juries was unnecessary under the facts of that case.

The *Clayton* case places a limit upon materiality before a Grand Jury. Under the broad language of the *Carroll* case, quoted and relied on by the Circuit Court in its opinion herein, there is no limit. Whether a limit exists, and what that limit is, should be determined by this Court.

CONCLUSION

It is urged that the instant case involves fundamental problems of law never passed on by this Court, and that the decision of the Circuit Court for the Second Circuit is in conflict with decisions of this Court, decisions of State and other Federal courts and well-settled fundamental principles of the common law. It is urged further that this Court should definitively determine the test of materiality in Grand Jury proceedings. For these reasons, it is urged that the questions presented and the conflict of opinion with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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